Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

(2)

No. 00-701

In The
SUPREME COURT OF THE UNITED STATES

CITY OF SIMI VALLEY

Petitioner

v.

PHILIP YOUNG,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Roger Jon Diamond, Esq.
2115 Main Street
Santa Monica, CA 90405
Telephone (310) 399-3259
Facsimile (310) 392-9029
Attorney for Respondent

15 pp

TOPICAL INDEX

Page

I. OPPOSITION TO PETITION 1

II. IF CERTIORARI IS GRANTED IT SHOULD BE LIMITED TO QUESTION NUMBER TWO 10

III. CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

City of Erie v. Pap's A.M.,
529 U.S. 277, 120 S. Ct. 1382 (2000).....2

Lim v. City of Long Beach,
217 F.3d 1050 (9th Cir. 2000).....11

Ohio v. Robinette,
519 U.S. 33, 136 L. Ed. 2d 347, 117 S. Ct. 417 (1996) 10

Vance v. Terrazas,
444 U.S. 252, 62 L. Ed. 2d 461, 100 S. Ct. 540 (1980) 11

DOCKETED CASES

Diamond v. City of Taft,
No. 00-608 11

I. OPPOSITION TO PETITION

The City's recitation of the facts in its Statement of the Case bears little resemblance to the actual events as correctly related by the District Court and the Ninth Circuit. For example, the City's Petition contains the following paragraph (Petition, p.2):

> "In late 1992, respondent . . . Young . . . applied for a special use permit to open and operate an adult nude dancing establishment at 999 East Los Angeles Avenue in Simi Valley. . . ."

The paragraph quoted above from the City's Petition should be compared with the second paragraph of the "Factual and Procedural Background" portion of the Ninth Circuit's opinion reprinted in appendix A at page 3a. The Ninth Circuit's paragraph refers to the proposed business as "an adult business. . .," not a ". . . nude dancing establishment. . . ." The City gratuitously includes the word "nude" to interject a non issue in this case and to create the third question presented.

What Young proposed was an adult cabaret, which is defined in the Simi Valley Municipal Code set forth at the top of appendix D, page 58a:

> "'Adult Cabaret' means a nightclub, theater, or other establishment which features

> live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, and where such performances are distinguished or characterized by an emphasis on sexual activities or specified anatomical areas, as defined herein."

The City's zoning, locational, and permit provisions of its Code apply to adult cabarets and are not restricted to totally nude establishments. Thus, nudity and City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382 (2000) are not involved in this case. Whether or not Young may be prohibited by the City from presenting totally nude entertainment, which he would like to present, Young still would like to open an adult cabaret and present whatever "adult entertainment" the Constitution requires the City to allow. Whether that includes nude dancing is irrelevant to this adult zoning case.

Young would not oppose this Court's granting of certiorari with respect to Question No. 3 if it meant this Court might reconsider its disastrous and totally unsupportable decision in City of Erie v. Pap's A.M., (that cities may prohibit totally nude dancing no matter how beautiful, artistic, non obscene, non lewd, and no matter that it is presented in enclosed theaters for adults only in industrial zones far away from sensitive uses). Otherwise, nudity is irrelevant to the issues considered by the District

Court and the Ninth Circuit.

Moving on with our comparison of the City's "facts" with the Ninth Circuit's facts we note that the City omitted the following facts from its Petition even though they are set forth in paragraphs 2 and 3 of the Ninth Circuit's "Factual and Procedural Background:"

After Young applied for the special use permit in late 1992, ". . . Young received a zoning clearance from the City, and applied for and received a business tax certificate." (Appendix A, p.3a).

The City also omits the following information: that on February 9, 1993 the City unilaterally rescinded without a hearing Young's zoning clearance and then adopted an emergency moratorium ordinance banning all adult uses throughout the City; this wiped out Young's proposed adult cabaret. Later the City adopted a permanent adult zoning ordinance which Young challenged in his lawsuit filed December 12, 1994. Young also challenged the rescission of his clearance.

The City's Petition did not mention that zoning clearance recission because it reveals the depths to which the City descended in its successful efforts to keep out all adult businesses.

The City next recounts Young's discovery of an alternative location at 585 East Los Angeles Avenue, but fails to mention that Young contacted the City to determine whether this new site was lawful for an adult cabaret and fails to mention what the Ninth Circuit stated in its opinion,

Appendix A, p. 5a:

> ". . . The City conducted a preliminary site inspection of the area and determined that there were no incompatible uses under the ordinance at that time. . . ."

The City explains in its Petition that the City denied Young's application for a special use permit for the new location at 585 East Los Angeles Avenue for two reasons: a karate school was already operating within 500 feet of Young's site and also the "Joshua Institute" had obtained an over the counter zone clearance on December 7, 1995, the day before the City deemed Young's application complete. Therefore, the City asserts, the City denied the application for two independent reasons, the existence of a karate school and the zone clearance for the Joshua Institute. Accordingly, the City asserts that independent of the Joshua Institute, since the karate school also disqualified the application the Ninth Circuit should not have reached the issue of whether the sensitive use veto renders the system unconstitutional. The City argues that Young lacks standing to challenge the veto provision of the ordinance.

However, while the Ninth Circuit may not have expressly mentioned the testimony of Young regarding his own refusal to go through the lengthy process again because of the sensitive use veto provision of the Simi Valley Municipal Code, the District Court did address the issue when it discussed the issue of Young's standing. The

portion of the District Court opinion reprinted at Appendix B, p. 44a, makes it quite clear that Young himself testified that he would never reapply for the required permit because of the sensitive use veto provision of the code. The District Court stated as follows:

> "Furthermore, Mr. Young specifically testified that, given his previously futile efforts and the time and money invested in these earlier efforts, he would not consider reapplying for a permit so long as the current system remains in effect in Simi Valley."

This presents a classic case of an individual who was deterred from exercising his First Amendment rights in a "real and substantial" way. Hence, Mr. Young clearly has standing to challenge the instant ordinance." Appendix B, pp.44a-45a.

The District Court's statement was based directly upon the trial court record, which Young will set forth here at length and in detail because of the City's unbelievable assertion that Young lacks standing to challenge the sensitive use veto provision of the code.

Young's trial testimony was as follows:

> "Q. Now, are you familiar with the place where the

Joshua Tree Bible study was able to get together and start its Bible study class?
A. I remember the place.
Q. It's depicted here on the photograph to the right. Can you point that out to the jury?
A. (Indicating.)
Q. And do you understand that in April of '96 it was simply -- in April of 1996 it was simply some folding chairs on a cement slab?
A. Yes.
Q. And you understand that the city - - that the city council meeting in April of '96 determined that that was a sufficient church or religious organization to preclude your adult theater from going in?
A. Yes.
Q. Now, as far as you can determine, would there be anything to stop a similar Bible study school from moving in in the same manner that it moved in within 500 feet of your location if - -
A. No.
Q. - - you have to finish - - let me finish the question.

Do you know whether there's anything to prevent the same thing from happening again if you were to happen to find a place at the shopping center for a proposed adult theater?
A. No .
Q. And there are at least - - there was one vacancy that would allow this to occur again? You can resume the witness stand.
A. Is there a vacancy that would allow this to happen again. There was no - - if there was a vacancy, but there was none that I could see.
Q. In the first area?
A. In any of the three areas.
Q. There was no - - but if there were a vacancy this could happen?
A. This could happen, definitely. They could move another what they call Bible school in there and preclude me from doing that again.
Q. Now, if theoretically you could find a place in the two shopping areas to put in an adult theater, knowing that it takes quite a bit of time to get approval, that even when

your application is completed, even then the city has 94 days to set a hearing before the planning commission, and even if the planning commission were to approve you, anybody could appeal the decision in your favor to the city council, it would get that person a new hearing. And assuming that at that new hearing the Bible study class moved into the shopping center vacancy that might occur, given all of that, would you want to try to locate an adult theater in the shopping center, now that you know what happened to you with respect to this particular project?

A. No, I would not.

Q. And why not?

A. Because I don't want to spend x amount of money for rent again, and go through all of the process just to be defeated again by somebody just moving in and claiming to be a religious organization or karate or whatever it is - - whatever it might be.

Q. So even if you could find

a place in the shopping center, and even if the parking were satisfactory and all of that, because of this system that the city has created, you would not want to try this again?
A. I would not, that's correct."(3 RT 13-16; SER 78-81)

Young's testimony continued:

"Q. What did you want?
A. I wanted a place to operate my business.
Q. And is that still your goal?
A. Well, under the circumstance, it's my goal, but I don't think under the circumstances I can ever do it, because they could always throw another church next to me, after another year of hard work. And it would just be all futile.
Q. So because of the ordinance, you are not willing to go to some other area, because this could happen again?
A. Right." (3 RT 166; SER

95)

In summary, for the reasons set forth above, this Court should deny certiorari with respect to questions 1 and 3. Young unquestionably had standing to challenge the veto provision of the code. Thus, question number 1 is not worthy of review. Likewise, question number 3 is irrelevant because this is an adult zoning case, not a nude dancing case.

II. IF CERTIORARI IS GRANTED IT SHOULD BE LIMITED TO QUESTION NUMBER TWO

Question number two includes the question as to whether the City has provided "a legally adequate number of adult business sites. . . ." See question number two at the beginning of Petition.

The Ninth Circuit stated in its opinion that Simi Valley is located approximately 35 miles north west of Los Angeles, has a population of slightly over 100,000 residents, and occupies 34 sq. miles in area. The District Court separately concluded that the number of possible sites for adult businesses in the City was "unconstitutionally low . . . ." Appendix B, p.46a.

The Ninth Circuit reversed the District Court on this point and concluded that as a matter of law four sites may be constitutional. It is this portion of the Ninth Circuit's decision which this Court may choose to review. The constitutional adequacy of the number of sites offered by the City of Simi Valley is fairly included within question number two. This Court would have jurisdiction under

Rule 14.1(a) to consider the question of whether the Ninth Circuit erred in vacating the District Court's injunction on the issue of adequacy of alternative locations. See Ohio v. Robinette, 519 U.S. 33, 38, 136 L.Ed.2d 347, 117 S.Ct. 417, 420 (1996) and Vance v. Terrazas, 444 U.S. 252, 258-259, n. 5, 62 L.Ed.2d 461, 100 S.Ct. 540, 544-545, n. 5 (1980). The issue of the sufficiency of alternative locations for First Amendment protected adult businesses is an important issue that this Court should resolve. The same issue is already pending before this Court in Diamond v. City of Taft, No. 00-608, docketed October 18,2000. It is also expected that the City of Long Beach, California will petition this Court for certiorari to review the decision of the Ninth Circuit in Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000). The Petition by Long Beach should be filed by November 21, 2000. All of these adult zoning cases will give this Court an opportunity to resolve the question as to the requisite number of adult business sites a particular city must offer prospective applicants.

It is expected that the City of Los Angeles will petition this Court for a writ of certiorari to review another recent Ninth Circuit adult zoning case, Alameda Books v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000).

The issue of reasonable alternative locations for adult businesses might be separately considered by a court but given the instant case the issue can be dealt with in the context of question number two. If certiorari is granted Respondent Young will submit a brief on the merits dealing with the issue of the adequacy of alternative locations since the issue is part of question number two. Accordingly, Respondent Young will not separately file a cross petition

on this issue.

With respect to question number two as framed by Petitioner it is clear that it is unconstitutional for a city to have a sensitive use veto provision because it does create an impossible situation for those seeking to open and operate adult businesses. As this case demonstrates, the permit process is lengthy and expensive. No one would go through the process if one could have his permit knocked out at the last minute. This is not a question of whether the City should prefer an adult business over a church or a school. Churches or schools are not precluded from operating near an adult business. It is inconceivable that an evil person would deliberately file thousands of applications for adult businesses to deter schools and churches from opening in particular areas. The idea that this could occur is preposterous. No prospective adult business owner deliberately files a permit application just to discourage a school or a church from moving into the area. The argument defies reality. There are so few places where adult businesses can be located in the first place that the danger is imagined, not real.

Respondent Young does agree with the Ninth Circuit that this is a case of first impression and therefore this Court may wish to take a second look at the issue. Obviously, if this Court should grant certiorari on question number two Respondent Young will seek affirmance of the Ninth Circuit. As stated, Respondent Young will also seek a ruling from this Court as to the adequacy of alternative locations.

III. CONCLUSION

For the foregoing reasons, Respondent Young opposes certiorari with respect to Questions 1 and 3 but does not oppose certiorari with respect to Question 2 if this Court includes within the question the issue of adequacy of alternative locations.

Respectfully submitted,

ROGER JON DIAMOND

Counsel of Record
Attorney for Respondent